

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 18, 2014

v

ANTHONY DERRICK CHANDLER, a/k/a
DERRICK ANTHONY CHANDLER,

No. 316862
Washtenaw Circuit Court
LC No. 12-000935-FH

Defendant-Appellant.

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of criminal sexual conduct, first degree (CSC-I), MCL 750.520b (sexual penetration with another while armed with a weapon, or defendant effected sexual penetration through force or coercion and the victim sustained personal injury), assault with intent to do great bodily harm less than murder, MCL 750.84,¹ and assault with a dangerous weapon (felonious assault), MCL 750.82. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 40 to 90 years' imprisonment for the CSC-I conviction, 40 to 60 years' imprisonment for the assault with intent to commit great bodily harm less than murder conviction, and 10 to 15 years' imprisonment for the felonious assault conviction. We affirm.

This case arises out of the sexual assault of a victim in Ypsilanti. The victim encountered defendant on the street and attempted to run away. After a brief altercation, defendant dragged the victim to a mattress in the woods. Defendant used a small knife as a weapon, from which the victim sustained personal injuries. As the victim tried to crawl away, defendant pulled her pants down while repeatedly kicking her in the back. Defendant then raped the victim. Defendant threatened to kill the victim multiple times during and after raping her.

After defendant raped the victim, he stood with his foot on her back, holding a large butcher knife. The victim once again tried to escape, but defendant repeatedly choked her. Police heard the victim's screams and found the victim while her pants were still around her

¹ Defendant was also charged with assault with intent to murder, MCL 750.83, but that charge was dismissed.

ankles. Defendant ran off into the woods before police arrived. The victim was interviewed by police on the scene before she was transported to the hospital to receive medical attention.

A nurse collected and preserved multiple blood and semen samples from the victim at the hospital. Samples obtained from the victim's coat, panty crotch, cervical swabs, and a glove left at the scene were tested for deoxyribonucleic acid (DNA). Samples were obtained, but not tested for DNA, from the victim's sweater, fingernails, rectal swab, external genitalia swab, hair, oral swab, arm wound (bite mark) swab, neck swab, and a knife found at the scene. Due to budget constraints and workload, experts only tested the evidence determined to be most significant. Testing revealed semen on the swabs collected from the cervical area and the panty crotch. Those samples were from the same individual, but did not match defendant's DNA. The DNA found on the glove matched defendant's DNA.² A sperm sample collected from the victim's coat was tested and matched defendant's DNA.³ The victim identified defendant as her attacker in a photo lineup administered by detectives and at trial.

Defendant's sole issue on appeal is his claim of ineffective assistance of counsel. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The ultimate question of law is reviewed de novo. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Since defendant was not granted a *Ginther*⁴ hearing, this Court's review is limited to mistakes apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

Both the United States and Michigan Constitutions guarantee a criminal defendant the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish ineffective assistance of counsel, a defendant must satisfy the two-part test set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, defendant must show that trial counsel's performance was objectively unreasonable under prevailing professional norms. *People v Trakhtenberg*, 493 Mich 38, 52-53; 826 NW2d 136 (2012). "In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy." *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). Second, if defendant can establish that his counsel's performance was unreasonable, defendant must then show this performance was so prejudicial that but for his attorney's unprofessional errors, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant has failed to satisfy this requirement.

² The knife did not contain enough DNA to generate a DNA profile.

³ A sample collected from victim's sweater was not tested for DNA and contained only blood, making it likely the blood was the victim's.

⁴ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

To support his claim, defendant first argues that his trial counsel was ineffective for failing to request a reinstruction on the burden of proof and the presumption of innocence and for approving the jury instructions the court eventually gave, following the jury's request for clarification. This argument fails.

The jury in this case submitted two questions during deliberations; the question at issue asked: "Your Honor, is there a specific legal or procedural reason that the defense could not have ordered or performed DNA analysis of the fingernail scrapings or bite areas on the victim?" Defense counsel suggested to the court: "I think the only appropriate answer to that question, Your Honor, is that there is no evidence to that one way or another." The jury then entered the courtroom and the trial court instructed the jury: "There is no evidence one way or another regarding that issue, and you must only consider the evidence that was admitted in this case."

As a preliminary matter, defense counsel's affirmatively requesting the jury instruction at issue constitutes a waiver of this argument. Indeed, defense counsel did not merely affirmatively approve the trial court's jury instructions, but actually *suggested* the instruction that the court subsequently provided to the jury. See *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000) (stating that trial counsel's affirmative approval of a given jury instruction constitutes a waiver that eliminates any error).

Irrespective of waiver, however, there was no error where the instruction at issue was proper and did not shift the burden of proof. The instruction was proper because it instructed the jury to only consider evidence admitted at trial. *People v Schmidt*, 196 Mich App 104, 108; 492 NW2d 509 (1992) (holding jurors must use the evidence received at trial to determine the facts of the case). Just as importantly, following closing arguments, the trial court provided the jury with standard instructions regarding the burden of proof and the presumption of innocence almost verbatim from CJI2d 3.2. The court's instruction provided as follows:

A person accused of a crime is presumed to be innocent. This means that you must start with the presumption that the defendant is innocent. This presumption continues throughout the trial and entitles the defendant to a verdict of not guilty, unless you are satisfied beyond a reasonable doubt that he is guilty.

Every crime is made up of parts called elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or to do anything. If you find that the prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty.

These jury instructions have repeatedly been held to sufficiently convey the concepts of reasonable doubt, the presumption of innocence, and the burden of proof. *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). Therefore, defense counsel was not ineffective for failing to request a reinstruction on the burden of proof and the presumption of innocence because the court had already given proper jury instruction in regard to these issues, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (stating that failure to object to a trial instruction, when the instruction is not erroneous, does not constitute ineffective assistance of counsel), and the supplemental instruction given was otherwise proper.

While defendant contends that the trial court's response to the jury's question shifted the burden of proof to defendant to show physical evidence of his innocence, as noted, the initial jury instructions properly instructed the jury in regards to the presumption of innocence, the burden of proof, and consideration of only evidence presented at trial. There was no error. Defendant was therefore not denied effective assistance of counsel on these grounds.

Defendant next argues that counsel was ineffective for failing to call an expert witness to test the remaining physical evidence, which could potentially have revealed a DNA profile other than his own, thereby discrediting the victim. This argument is likewise meritless. A defense counsel's decision to present evidence or call and question witnesses is presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). It only constitutes ineffective assistance if it deprives a defendant of a substantial defense. *People v Dunigan*, 299 Mich App 579, 589; 831 NW2d 243 (2013). A substantial defense is one that affects the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Similarly, "[t]he failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004).

Here, it was reasonable for defense counsel not to request further DNA testing to avoid the risk of creating additional incriminating evidence, since defendant's DNA was already found on the victim's coat and a glove left at the scene. And, there was already testing done that revealed other contributors of DNA on the victim providing defense counsel the ability to argue that the attacker was someone else. Defendant has failed to overcome the presumption that defense counsel's decision not to test the remaining physical evidence was sound trial strategy.

Additionally, defendant has failed to demonstrate how additional DNA testing would have resulted in a different outcome at trial. The victim's testimony alone—consisting of her account of the attack and subsequent identification of defendant as the attacker—could have sufficed to convict defendant of CSC-I. MCL 750.520h; *People v Lemmon*, 456 Mich 625, 632, 632 n 6; 576 NW2d 129 (1998). Further, experts testified at trial that defendant's DNA was found on the glove and the victim's coat. The experts also informed the jury, however, that there were additional DNA profiles obtained from the cervical and panty swabs that did not match defendant's DNA. In other words, evidence was already presented substantiating the very theory defendant relies upon in asserting this ineffective assistance claim. Where DNA profiles other than defendant's already existed, additional DNA tests establishing other people's DNA on some of the additional evidence would not have altered the outcome of the trial. Consequently, defense counsel's decision to forgo testing the remaining evidence was sound trial strategy and defendant cannot establish outcome determinative error. *Armstrong*, 490 Mich at 290.

Defendant's final argument is that he was denied the effective assistance of counsel due to the cumulative effect of defense counsel's errors. Courts review a cumulative-error argument to determine if the combination of the alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). The cumulative effect of several minor errors may warrant reversal even when the individual errors would not warrant reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). In making this determination, actual errors are aggregated to determine the cumulative effect. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). No errors were found in either of the issues raised

by defendant, so there cannot be a cumulative effect of errors. *Id.* Defendant simply cannot establish ineffective assistance of counsel on this record.

Affirmed.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello